

**IN THE NAME OF THE REPUBLIC OF ARMENIA
DECISION OF THE CONSTITUTIONAL COURT OF
THE REPUBLIC OF ARMENIA**

**ON THE CASE OF CONFORMITY OF POINT 5 OF ARTICLE 102 OF THE LAND CODE
OF THE REPUBLIC OF ARMENIA WITH THE CONSTITUTION OF THE REPUBLIC
OF ARMENIA ON THE BASIS OF THE APPLICATION OF THE COURT OF GENERAL
JURISDICTION OF ARARAT AND VAYOTS DZOR MARZES**

Yerevan

October 30, 2018

The Constitutional Court composed of H. Tovmasyan (Chairman), A. Gyulumyan, A. Dilanyan, F. Tokhyan, A. Tunyan, A. Khachatryan, H. Nazaryan (Rapporteur), A. Petrosyan,

with the participation (in the framework of the written procedure)

the applicant: the Court of General Jurisdiction of Ararat and Vayots Dzor Marzes,

representative of the respondent: official representative of the RA National Assembly A. Kocharyan, Chief of the Legal Expertise Division of the Legal Expertise Department of the RA National Assembly Staff,

pursuant to Point 1 of Article 168, Part 4 of Article 169 of the Constitution, and Articles 22 and 71 of the Constitutional Law on the Constitutional Court,

examined in a public hearing by a written procedure the case on conformity of Point 5 of Article 102 of the Land Code of the Republic of Armenia with the Constitution on the basis of the application of the Court of General Jurisdiction of Ararat and Vayots Dzor Marzes.

The Land Code (hereinafter referred to as the Code) was adopted by the National Assembly on 2 May 2001, signed by the President of the Republic on 4 June 2001, and entered into force on 15 June 2001.

The challenged norm prescribed in Article 102 of the Code, titled “Grounds for compulsory termination of rights to a land” prescribes:

“The rights to a land shall be compulsorily terminated through judicial procedures:

...

5) Non-payment of the land tax for three years and the debt during the fourth year ...”

The case was initiated on the basis of the application of the Court of General Jurisdiction of Ararat and Vayots Dzor Marzes submitted to the Constitutional Court on 26 June 2018, in which the decision UՎԴ2/1791/02/17 of 15 June 2018 of the Court of General Jurisdiction of Ararat and Vayots Dzor Marzes on “Applying to the RA Constitutional Court” was presented.

Having examined the application, the written explanation of the respondent, as well as having analyzed the relevant provisions of the Code, other norms of the legislation interrelated with the latter, and other documents of the case, the Constitutional Court **ESTABLISHES:**

1. Positions of the applicant

Referring to the norms of Article 60 of the Constitution, Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, referring to the legal positions expressed in the decisions of the Constitutional Court and the case-law decisions of the European Court of Human Rights, the applicant considers that deprivation of property motivated by non-payment of the land tax “ ... is not suitable and necessary for the achievement of the goal prescribed by Part 8 of Article 60 of the Constitution from the perspective of protecting the property rights of the person, since there are more favorable means, i.e. the proceedings for the recovery of the sum according to the public legal monetary claim on the basis of a non-appealable administrative act”. The applicant also believes that “... due to the need to protect the rights and freedoms enshrined in the Constitution, ... in order to collect land tax, the authorized body is required to decide on the possible legitimate solution for initiating proceedings for the recovery of the sum according to the public legal monetary claim on the basis of a non-appealable administrative act, rather than the deprivation of property”. According to the applicant, “... deprivation of property motivated by non-payment of the land tax for three years and the debt during the fourth year cannot be considered justified, since it has nothing to do with protecting the interests of society and the fundamental rights and freedoms of others, there is no fair balance between the general interests of society and the requirement to protect the fundamental rights of the individual, and in the case failure of payment of the land tax, no common interests of the society are violated ... ”.

2. Positions of the respondent

According to the respondent, the challenged provision meets the requirements of the Constitution.

The respondent believes that as a measure of responsibility, the restriction of property rights enshrined in Point 5 of Article 102 of the Code, “... pursues more than a legitimate goal, as well as it is commensurate in the context of the attribute of the State due to the presence of the conditions and means necessary for the existence of the State, and consequently also in the context of considerations of ensuring the public interests of all members of society, which is aimed at ensuring an equitable balance between the general interests of society and the fundamental rights and its protection”. Referring to a number of articles of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Constitution, as well as recalling to the legal positions of the European Court of Human Rights, the respondent concludes that the legal

regulation challenged in the present case “... ensures ... the unity of legal logic, since the grounds for the restriction of property rights enshrined in the challenged provision should be based on the need to ensure the normal functioning of the State and society, and serves as a measure to ensure the balance of public and private interests, which is not inferior to but exceeds the goal pursued by the provisions prescribed in Points 1, 2, 3, 7 and 9 of Article 102 of the Code”.

3. Circumstances to be clarified within the framework of the case

When determining the constitutionality of the challenged norm in the present case, the Constitutional Court considers it necessary to establish:

- whether the norm provided for in Point 5 of Article 102 of the Code is a proportionate measure to ensure a fair balance of public and private interests in the context of constitutional legal regulations of Articles 60 and 78 of the Constitution?
- whether the right of a person to judicial protection fully guaranteed within the framework of the system's interconnection of the norm challenged in the present case and other norms of legislation ensuring the realization of the right to property, assuming that the effectiveness and accessibility of the realization of this right are conditioned by the legal remedy to protect the rights of the person, including property rights?
- whether the termination of rights to a land by court procedure in case of non-payment of the land tax within three years and the failure of payment during the fourth year follows from the essence and content of the right to property guaranteed by the Constitution?

4. Legal positions of the Constitutional Court

4.1. As a characteristic of guaranteeing the rights and freedoms of a person in a democratic, social and rule of law state, and also as a mechanism for regulating private and public interests, the right to property is of important constitutional legal significance. It was consolidated in international law in the Universal Declaration of Human Rights (Article 17), Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, according to Article 1 of which, every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his property except for the public interest and subject to the conditions provided for by law and by the general principles of international law. At the same time, Part 2 of Article 1 of the mentioned Protocol ensures the right to envisage by law such legal regulations that are dictated by public interests or are necessary for paying taxes, fees or fines.

The Constitutional Court states that the aforementioned legal conditions are of primary importance for the legislative regulation of the right to property in the domestic legal system.

According to Article 10 of the Constitution, all forms of ownership shall be recognized and equally protected in the Republic of Armenia.

According to Parts 1, 3, 4, 5 and 6 of Article 60 of the Constitution, everyone shall have the right to own, use and dispose at his discretion the legally acquired property; this right may be restricted only by law to protect the interests of the public or the fundamental rights and freedoms of others; no one shall be deprived of his ownership, except by court procedure in cases prescribed by law; expropriation of property for prevailing public interests shall be performed in exceptional cases and in the procedure prescribed by law, and only with prior and adequate compensation.

Thus, the positive obligation of public authority to ensure the inviolability of the right to property is prescribed both at the international legal and constitutional levels, in particular:

Firstly, without any discrimination, to recognize and protect the right to property, regardless of the form of its manifestation;

Secondly, to guarantee the protection of the right to property, creating prerequisites for the possession, utilization and management of the property legally exercised by the owner freely, as well as for the free development and equal legal protection of all forms of ownership; **Thirdly**, to establish the legal framework for the freedom to exercise the right of ownership according to the purpose predetermined by the Constitution;

Fourthly, to guarantee, in cases established by law, the fulfillment of the constitutional legal requirements for depriving a person of property rights by court procedure, the compulsory expropriation of property for prevailing public interests, as well as to ensure prior and adequate compensation.

In a number of decisions (DCC-92, DCC-630, DCC-649, DCC-650, DCC-667, DCC-669, DCC-735, DCC-815, DCC-901, DCC-903, DCC-1009 , DCC-1056, DCC-1073, DCC-1142, DCC-1189, DCC-1203, DCC-1210, etc.), the Constitutional Court referred to the issues of revealing the constitutional legal content of the right to property, protection of possible restriction of this right, and expressed legal positions concerning the essence of the right to property, the constitutionality of the legal regulation of relations in connection with the restriction, termination of this right, indicating the need to apply legal measures arising from the principle of constitutional order in this

sphere, at the same time revealing the content of the constitutional term deprivation of property and the experience of its application and perception in the international legal practice.

Based on the content of the issues raised in the application of the present case and reiterating the positions on the given issues, the Constitutional Court considers it important to assess also the issue of proportionality of legal measures aimed at the possible termination of property rights and, in particular, land ownership in connection with ensuring that payments made to the State or community budget are paid in respect of the obligation to pay land tax.

When assessing the constitutionality of the challenged legal regulation of the Code, the Constitutional Court considers it necessary to examine it primarily in the framework of the fulfillment of the obligation determined by the type of mandatory payment prescribed in Part 8 of Article 60 of the Constitution, as well as in the framework of the content analysis of the legal status of a land as type of real estate property, based on the general logic of legal regulations of the Civil Code, the Tax Code and the Law on Land Tax.

4.2. A comprehensive analysis of both the challenged norm and other norms of the Code related to the challenged norm shows that:

- land is an immovable property, and both the land and status of land (including the ownership of land and other property rights) are subject to state registration in accordance with the procedure prescribed by the legislation (Article 5 and Part 1 of Article 53 of the Code);
- the right to property on land is the right of the owner to possess, utilize and manage the land at his own discretion, in compliance with the restrictions and other conditions provided by law (Part 1 of Article 44 and Article 109 of the Code);
- restrictions of rights to a land (including the right to property) are directly prescribed by law and other legal acts, by a contract or judicial procedures (Part 2 of Article 49 of the Code);
- there are cases of termination and restriction of the right to ownership of land, including in cases of imposing penalties on the land due to the obligations of the owner (Part 1 of Article 100, as well as Articles 101, 102, 103, 104 and 105 of the Code);
- the rights and obligations of the owners of land are prescribed, including making mandatory payments (Articles 109 and 110, as well as Point 7 of Part 2 of Article 110, and Articles 111 and 112 of the Code);

With regard to the performance of duties and the realization of rights to a land due to the object of taxation, the comprehensive analysis of the legal regulations of the Law on Land Tax, the Civil Code, and the Tax Code shows that:

- as a mandatory payment, land tax is paid in a certain amount and procedure both by the owners of land and regular landholders owned by the State (Articles 1, 2, and 3-9 of the Law on Land Tax);
- as in the case of other objects of taxation, benefits for the payment of land tax are envisaged (Articles 10 and 11 of the Law on Land Tax);
- the general procedure and conditions for the payment of land tax to the State and community budget are established (Chapter 4 of the Law on Land Tax);
- general principles of liability for violations with regard to payment of land tax and exemption from its payment are envisaged (Article 18 of the Law on Land Tax).

Accordingly, comparing the above regulations of the Code with the relevant provisions of the Civil Code and the Law on Land Tax regulating relations in respect of property rights, ownership, and fulfillment of obligations, the Constitutional Court states that as an object of civil rights and a form of real estate (Article 132 and 134 of the Civil Code), and therefore as an object of taxation (Article 10 of the Tax Code), the land has the same **general legal status** as that established for other forms of real estate as an object of property, with the peculiarities stipulated by the Land Code. Consequently, the Constitutional Court finds that the **common logic** of the aforementioned normative regulations, in particular regarding obligation of the payment of land tax, is objectively aimed at the implementation of the legal regulation stipulated in Part 8 of Article 60 of the Constitution, and it does not prescribe any **fundamental differentiation**.

4.3. Referring to the challenged legal regulations of Article 102 of the Code and the legal regulations stipulated by other norms of the same Code systematically interconnected with the latter legal regulation, the Constitutional Court states that the current procedure of termination of rights to a land prescribed in Chapter 20 of the Code is based on the concept according to which:

- the **grounds for termination** of property rights of individuals to a land by judicial procedures due to legal fact are specified, including in case of imposing penalties on a land due to the obligations of the landholder (Part 1 of Article 100, Point 8 of the same Part, and Article 101);
- the **grounds for compulsory termination** of property rights of individuals to a land in accordance with judicial procedures are established (Articles 102, 104, and 105), including on the

grounds of non-payment of the land tax for three years and the outstanding debt during the fourth year, as challenged in the present case (Point 5 of Article 102).

Consequently, unlike the procedures prescribed by the above-mentioned grounds for termination of rights to a land, the challenged norm by its legal contents as an indisputable fact of compulsory termination of the right to property judicially prescribes non-fulfillment of the tax liability in respect of the State or community budget within three years and outstanding debt during the fourth year due to which, despite the amount of the debt, envisaged by the obligation, the person, by merits, is fully deprived of property rights to the taxed land, and the possibility of fulfillment of the tax liability at the expense of other property (movable, immovable) owned by the person is excluded by imposing penalties on the latter or ensuring proper administration of the tax liability in the manner prescribed by law.

4.4. Referring to the case-law of the European Court of Human Rights on the interference in the right to property for ensuring the payment of taxes, the Constitutional Court states that in a number of cases the Court has emphasized the right of States to enact and apply such laws as they deem necessary for exercising control over property in accordance with common interests, or securing the payment of taxes or other charges or fines (in particular, see *Gasus Dosier-und Fördertechnik GmbH v. the Netherlands*, 15375/89, 23.02.1995, §60¹). At the same time, according to the well-established case-law, the second paragraph of Article 1 of Protocol No. 1 to the Convention must be construed in the light of the principle laid down in the Article's first sentence. Consequently, interference must achieve a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The concern to achieve this balance is reflected in the structure of Article 1 of Protocol No. 1 to the Convention as a whole, including the second paragraph, according to which: there must be a reasonable relationship of proportionality between the means employed and the aim pursued (see *ibid*, §62, as well as *National & Provincial Building Society, Leeds Permanent Building Society et Yorkshire Building Society*, 117/1996/736/933-935, 23.10.1997, §80²). According to the Court's position, to establish whether this requirement is met, at the Contracting State must be allowed a wide margin of appreciation when developing and applying taxation policies, and the Court will respect the legislature's assessment in such matters **unless it is devoid of reasonable foundation** (see, *Gasus Dosier-und Fördertechnik GmbH v. the Netherlands*, 15375/89, 23.02.1995, § 60).

¹ <http://hudoc.echr.coe.int/eng?i=001-57918>

² <http://hudoc.echr.coe.int/eng?i=001-58109>

In the *Microintelect OOD v. Bulgaria* judgment of March 4, 2014 (*Microintelect OOD v. Bulgaria*, 34129/03, § 36³), which concerns the forfeiture of goods belonging to a person by the decision of an administrative authority, the European Court of Human Rights considered that the forfeiture can be examined as both a constituent element of the procedure for the control of the use of excise goods (see, *AGOSI v. the United Kingdom*, 24 October 1986, §51⁴, *Bowler International Unit v. France*, no. 1946/06, §41, 23 July 2009) and as a measure securing the payment of taxes or penalties (see, *Gasus Dosier-und Fördertechnik GmbH v. the Netherlands*, 15375/89, 23.02.1995, §59).

The European Court also noted that in case of forfeiture of goods belonging to a person, ensuring effective measures for challenging such decisions is highlighted, although Article 1 of Protocol No. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms contains no explicit requirements (see, *Microintelect OOD v. Bulgaria*, 34129/03, §44).

The main conclusion is that, in order to fulfill the legitimate obligations stipulated by law, the proportionate use of administrative measures cannot be considered as a violation of the right to property or deprivation of property. It is essential to guarantee an effective measure of submitting judicial complaint against administrative interference.

4.5. The Constitutional Court considers that the unity of the basic principles to possess, utilize and manage land and other forms of real estate, as well as the taxation of civil law objects prescribed in Point 4.2. of the present Decision indicates that the law should guarantee the general organizational mechanisms and procedures necessary for the effective exercise of these rights, based on the need for guaranteeing freedom of realization of constitutional rights and freedoms, as well as the constitutional legal requirement of unconditional fulfillment of constitutional duties. In the framework of the subject matter of the present case, this implies, in particular, that as guaranteed by Articles 10 and 60 of the Constitution, the ownership of real property, including land, must be realized in accordance with general principles within the framework of relations on the taxation. In particular, according to the requirement of Part 8 of Article 60 of the Constitution, the obligation of persons to pay taxes (including land tax), duties and other mandatory payments, within the general constitutional legal content of the same Article, assumes that for the fulfillment of this obligation, with certain exceptions stipulated by law, a person, as a rule, shall be liable for his obligations with all the property belonging thereto, without substantive differentiation of this property (objects of ownership), and as a general principle of legal regulation ensuring the fulfillment of civil

³ <http://hudoc.echr.coe.int/eng?i=001-141365>

⁴ <http://hudoc.echr.coe.int/eng?i=001-57418>

obligations, the latter is also prescribed in a number of norms of the Civil Code (Articles 60, 74, 75, 77, 83, 90, 95, etc). At the same time, it follows from the requirement of Part 4 of Article 60 of the Constitution that in cases prescribed by law, as of ensuring the compulsory implementation of tax obligations, a person may be deprived of ownership exclusively through judicial procedures, as a result of a fair and public hearing of his case within a reasonable period, which also implies that the form of property (movable, immovable) owned by the person, on which penalties may or must be imposed, is determined due to a comprehensive, objective and complete assessment of the circumstances of the case (violation of tax obligations).

Based on the above-mentioned, the Constitutional Court considers that in the context of the constitutional legal regulations of Articles 60 and 78 of the Constitution, the norm stipulated in Point 5 of Article 102 of the Code does not serve as a proportionate and effective measure for the regulation of public legal relations. In the framework of a fair trial, the need for a full and comprehensive study and assessment of the objective or other circumstances regarding the fulfillment of tax obligations by a person, who owns the given land, are not fully taken into account by such legal regulation, or the possibility of ensuring the fulfillment of this obligation through imposing penalties on other property owned by the person, as well as the constitutional right of a person to effective judicial protection is not fully guaranteed, which is justified within the framework of arguments provided by the applicant in the present case. The effectiveness and accessibility of the realization of this right is objectively determined by the full-fledged legal opportunity of protection of the rights of a person, including the right to property, which is essential for ensuring the effective regulation of both public and private legal relations. Legal regulation on the unconditional compulsory termination through judicial procedures of the rights to a land due to non-payment of the land tax for three years and the debt during the fourth year does not follow from the essence and content of the property rights of a person guaranteed by the Constitution, as well as the essence of the constitutional legal obligation of public authority to guarantee the protection of this right, and therefore it is not aimed at ensuring a fair balance between the protection of the general interests of society and the fundamental rights of the individual. The voluntary non-fulfillment of the obligation to pay the land tax, as a mandatory payment, objectively leads to the collection of debt by the State through legal coercion, which is legitimate and pursues the aim prescribed by the Constitution, although in the context of Article 60 of the Constitution, it cannot be considered as deprivation of property, and in the aspect of structure it is partially implemented, for instance, in Point 9 of Article 102 of the Code, according to which: penalties on a land may be imposed due to the obligations of the landholder.

The Constitutional Court also considers that, in the context of the requirements of Article 78 of the Constitution, the ground for termination of the right to property prescribed in the challenged provision does not directly follow from the need to ensure the priority interests of the State and society regarding the property rights of a person, it is not a necessary measure for achieving the goal stipulated by Part 8 of Article 60 of the Constitution, it is not commensurate with the meaning of the limited right, and it is not a justified measure in terms of ensuring a balance between public and private interests. The Constitutional Court considers that the compulsory termination of the rights to a land on the basis of non-fulfillment of tax obligations arising from the use of land is such an extreme measure that should be applied in case all other suitable and necessary legal measures are exhausted to achieve the goal dictated by the highest interests of the state and society. In particular, non-fulfillment of the obligation to pay the land tax may serve as basis for the compulsory termination of the rights to a land, **if the fulfillment of the given tax obligation in a different way was not secured commensurate with the tax debt, including as a result of imposing penalties on other property owned by the taxpayer.** The latter is also important when imposing penalties on a land and (or) for compulsory termination of rights to a land on the aforementioned ground, since the recoverable part of property, including land, or all together cannot exceed the amount of debt (amount) payable to the State or a community budget due to the non-fulfillment of the tax obligation.

Consequently, on the basis of the constitutional legal content of Articles 10 and 60 of the Constitution, as well as the requirements of Article 75 of the Constitution, it is the duty of the legislator to ensure effective procedures when establishing normative regulations ensuring the compulsory enforcement of the obligation to pay land tax for the full protection of the right to property on the one hand, and, on the other hand, in case of need, for ensuring the fulfillment of the obligation to pay land tax to the State or community budget in the framework of proper administration, as well as by means of imposing such penalties on other property owned by a taxpayer through judicial procedures, which is fair and equivalent to the tax liability.

Based on the review of the Case and governed by Point 1 of Article 168, Part 4 of Article 169, Parts 1 and 4 of Article 170 of the Constitution, Articles 63, 64 and 71 of the Constitutional Law on the Constitutional Court, the Constitutional Court **HOLDS:**

1. To declare Point 5 of Part 102 of the RA Land Code contradicting Articles 60, 75 and 78 of the Constitution and void.

2. Pursuant to Part 2 of Article 170 of the Constitution this Decision shall be final and shall enter into force upon its promulgation.

Chairman

H. Tovmasyan

October 30, 2018

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